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November 7, 2003

TO: Each Supervisor

FROM: Thomas L. Garthwaite, M.D. 
Director and Chief Medical Officer

SUBJECT: **BAYER CORPORATION AND GLAXOSMITHKLINE NATIONAL SETTLEMENTS**

This is to provide you with information regarding an April 16, 2003, national Medicaid-fraud settlement between the United States Department of Justice and both the Bayer Corporation ("Bayer") and GlaxoSmithKline Pharmaceuticals ("GSK"). These pharmaceutical companies have agreed to pay settlements totaling more than \$344 million for their fraudulent failure to report accurately the "best price" information used in the calculation of Medicaid prices.

Background: GSK repackaged and privately labeled Paxil[®], an anti-depressant, and Flonase[®], a nasal spray for Kaiser Permanente (HMO) and sold them at discounted prices. Bayer engaged in a similar practice regarding two of its proprietary drugs, Adalat CC[®] and Cipro[®]. Bayer and GSK contended that the slightly altered packaging allowed them to avoid reporting to the federal government the new low prices given to Kaiser and thus avoided paying millions of dollars in additional drug rebates to the Medicaid program. This type of fraud scheme is known as "lick and stick" in reference to the use of a new label on the drug. Certain private entities which receive 340B drug pricing through the Public Health Services Act also paid higher costs because of this scheme.

In its agreement, GSK settled its federal civil False Claims Act liabilities and will pay \$87,600,922 to the United States, 49 states, the District of Columbia, and certain 340B-eligible entities as civil damages for losses suffered by the Medicaid programs and the entities entitled to 340B drug prices. The Bayer Corporation resolved its federal civil False Claims Act liabilities and will pay the United States, 49 states, the District of Columbia, and 340B-eligible entities \$251,609,200 in civil damages for losses suffered by the Medicaid programs and the 340B-eligible entities due to Bayer's failure to report its Kaiser private label prices to the government as the true "best price" for its drugs.

Impact on DHS: As an entity entitled to 340B drug prices, DHS is eligible for a portion of the settlement based on its relative damages compared to other entities which were also damaged. DHS is also eligible for a portion of the settlement from Bayer. The settlement amount received by each facility was based on the purchase quantity of the settlement medication. During the past months, several DHS facilities have received checks from GSK and Bayer, in the amounts listed below:

Facility	GSK Settlement Amount	Bayer Corporation Settlement Amount
LAC+USC Med Center	\$11,710.40	\$53,737.71
Martin L. King, Jr./Drew Med Center	\$25,402.56	\$61,203.90
Valley Care Med Center	\$3,755.78	\$73,937.09
Harbor/UCLA Med Center	\$4,864.32	\$110,393.28
Roybal Comprehensive Health Cntr	\$0	\$18,045.84
El Monte Comprehensive Health Cntr	\$810.60	\$18,020.42
H. Claude Hudson Comprehensive Health Cntr	\$0	\$26,741.54
H. Humphrey Comprehensive Health Cntr.	\$0	\$51,445.02
Long Beach Comprehensive Health Cntr.	\$0	\$23,260.81

*checks already cashed (pursuant to Auditor/Controller policy; prior to County Counsel recommendations to hold cashing of settlement checks)

GSK sent each facility a cover letter indicating that 340B-eligible entities will be releasing any and all claims against GSK for the drugs involved in the settlement if these checks are cashed. Bayer's facility checks referenced a "federal settlement agreement." Due to the fact that "best price" is a confidential amount, we are unable to validate whether the settlement amount received is accurate, and thus the implications of this waiver to appeals rights is difficult to assess.

DHS has forwarded our purchase quantities during the settlement period, by facility, to the Public Health Pharmacy Coalition (PHPC), of which we are a member. PHPC will forward our purchase history reports to the Office of Inspector General (OIG) for validation of the GSK settlement amounts. Similar action in regards to the Bayer portion of this settlement will also follow in the same manner.

County Counsel has advised that the restrictive provision in the GSK cover letter is likely to be considered enforceable under California law. Nevertheless, unless we hear from your offices to the contrary in the next ten days, we will proceed to cash the settlement checks. Given the difficulty in validating the settlement and the relatively small amounts involved, it does not appear worthwhile to forgo the current use of these funds simply to preserve our appeal rights. Moreover, we are hopeful that, in the event that the settlement payments were incorrectly calculated, the OIG will use its persuasive authority to obtain a corrected payment to the County, even though we have cashed the checks.

Please feel free to contact Dr. Jeffrey Guterman if you have any questions about this matter.

TLG:jg

c: Chief Administrative Officer
County Counsel
Executive Officer, Board of Supervisors